FIMA PALMBULK SERVICES SDN. BHD.

v.

SURUHANJAYA PELABUHAN PULAU PINANG & ANOR.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[ORIGINATING SUMMONS NO. 346 OF 1985]
14 SEPTEMBER 1987

CIVIL PROCEDURE: *Application to set aside appointment of arbitrator - Under arbitration clause of lease agreement - Sub-lease - Whether arbitration clause is applicable between lessor and sub-lessee - Whether agreement was a sub-lease or an assignment - Section 9(b) Arbitration Act 1952.*

This is an application by the plaintiffs to set aside the appointment of the 2nd defendant to act as an arbitrator in a dispute between the plaintiffs and the 1st defendant.

The 1st defendant leased a piece of land to Kumpulan Fima Bhd. for the purpose of doing certain work for the 1st defendant. Kumpulan Fima Bhd. then sub-leased the same property to the plaintiffs for the purpose of implementing the said project for the remainder of the period in the main lease.

The lease and sub-lease provide for arbitration and the appointment of two arbitrators in the event of dispute arising between the parties under the lease or sub-lease in accordance with the Arbitration Act 1952.

As a result of a dispute, the 1st defendant appointed the 2nd defendant as arbitrator. Upon the plaintiffs' failure to do so, the 1st defendant exercised their rights provided under s. 9(b) of the Arbitration Act 1952 and appointed the 2nd defendant as the sole arbitrator.

Subsequently, the plaintiffs pointed out to 1st defendant or the plaintiffs. The plaintiffs contended that since there was no privity of contract between the plaintiffs and the 1st defendant, the 1st defendant has no right to call the plaintiffs to go to arbitration under the arbitration clauses.

The 1st defendant contended that in reality the sub-leases are actually assignments and urged the Court to go behind the form of the document and to look at the intention of the parties, the reality of the situation and the essence of the transaction to discover whether it was a sub-lease or an assignment.

Held:

[1] In determining the contractual relationship, the intention of the parties is an important consideration and the intention must be sought from the substance, the conduct of the parties and the surrounding circumstances.

[2] The sub-lease should be construed as an assignment for the following reasons:

(a) In substance the preliminary discussions between the 1st defendant and Kumpulan Fima Bhd. culminating in the execution of the sub-lease was for the preparation of an assignment.

(b) The incorporation of the plaintiff company was for the purpose of undertaking the said project and the plaintiffs required the documents to be prepared as sub-lease instead of assignment to enable them to charge the said property to a consortium of commercial banks for a loan.

(c) The term of the sub-lease terminates on the day before the lease expires and both the lease and sub-lease is renewable to end on the same day.

(d) Since the sub-lease is capable of being renewed to last precisely the same length of time as the lease may be renewed, the sub-lease should be construed as an assignment, being a demise of the whole term.

[3] Further, an identical interest is also transferred i.e., the rights and obligations under the lease to build, construct and maintain the bulking installations.

[Plaintiffs' application dismissed with costs.]

Cases referred to:
Kepong Prospecting Ltd. v. Schmidt [1968] 1 MLJ 170
Yong Nyee Fan & Sons Sdn. Bhd. v. Kim Guan & Co. Sdn. Bhd. [1979] 1 MLJ 182
Goh Gin Chye & Anor. v. Peck Teck Kian Realty Pte. Ltd. & Anor. [1987] 2 MLJ 118
Milmo v. Carreras [1946] 1 KB 306

Legislation referred to:
Arbitration Act 1952, s. 9(b)
National Land Code 1965, s. 222, Forms 15A, 15B

Other sources referred to:
Modern Law of Real Property, Cheshire and Burn's, 13th Edn. p. 439
National Land Code, Judith Sihombing, p. 411

For the plaintiffs/applicants - S.E. Rajah; M/s. Zain & Co.
For the 1st defendant - Lim Peng Siew; M/s. Lim Huck Aik & Co.
For the 2nd defendant - Manjit Singh; M/s. Sri Ram, Zulkifly & Kumar

JUDGMENT

Mohamed Dzaiddin J:

This is an application by the plaintiffs to set aside the purported appointment of the 2nd defendant to act as an arbitrator in a dispute between the plaintiff and the 1st defendant.

The facts which give rise to this dispute may be summarised as follows: The 1st defendant is the registered proprietor of land within the Butterworth Port and by two leases dated 27 November 1980 and 2 September 1981 ("the said leases") the 1st defendant leased to Kumpulan Fima Bhd. the property known as Butterworth Deepwater Wharves for the purpose, *inter alia,* of erecting and thereafter repairing and maintaining a Bulking Installation ("the said Project") for a period of seven years.

By two sub-leases dated 11 October 1982 ("the said sub-leases") Kumpulan Fima Bhd. sub-leased the said property to the plaintiffs for the purpose of implementing the said project for the remainder of the period in the main leases. It is important to note here that although the sub-leases stipulated that the consent of the 1st defendant was required they were nevertheless not a party to the said sub-leases. It is further noted that the leases and the sub-leases provided for arbitration in the event of any dispute or question arising between the parties under the leases and sub-leases in accordance with the Arbitration Act 1952. During the subsistence of the sub-leases the plaintiffs took out contract works policy of insurance with Commercial Union Assurance (Malaysia) Sdn. Bhd. dated 15 September 1981, whereby the insurers agreed to indemnify the plaintiffs and their contractors and sub-contractors for a total insured sum of RM21,000,000 any loss, destruction, damage or liability concerning the said project or the plaintiffs incurring any legal liability as stipulated in the said policy.

By Contract Nos. 1 and 2 dated 10 September 1981 and Contract No. 6 dated 4 March 1982 the plaintiffs appointed United Engineers (M) Bhd. as the contractor, whilst by an agreement dated 18 March 1983 Juantara Konsultang Sdn. Bhd. was appointed the consulting engineers for the said project.

On 22 February 1982 the 1st defendant granted to United Engineers (M) Bhd. rental of a piece of land on the five foot way along the bridge at the 4th, 5th and 6th entrances of Butterworth Deep Water Wharves on a monthly basis commencing 15 December 1981 for the storage of piles and building materials belonging to United Engineers (M) Bhd. Consequently, there had been some damage to access bridge No. 2 which was the bridge whose five-foot way between the 4th and 5th entrances was rented to United Engineers (M) Bhd. The 1st defendant alleged that it was due to the negligence of the plaintiffs and made an initial claim of RM2,760.65. Subsequently, further claims were made and by letters dated 8 June 1983 and 10 October 1983, the 1st defendant's solicitors informed the plaintiffs that they were held liable to indemnify the 1st defendant for the cost of repairs estimated at RM2,176,000 and requested for terms of settlement. Pursuant to the policy of insurance, the plaintiffs on 18 July 1983 forwarded the claim to their insurers, Commercial Union Assurance (Malaysia) Sdn. Bhd.

Both the leases and the sub-leases provide for the appointment of two arbitrators one to be appointed by each party in the event of any dispute. Paragraph 6(7) of the Annexure to the sub-lease provides as follows:

> If any dispute or question whatsoever shall arise between the parties hereto with respect to the construction or effect of this sub-lease or any clause or thing herein contained or the rights duties or liabilities of either party under this sub-lease or otherwise in connection with the sub-leased land the matter in difference shall be determined by two arbitrators one to be appointed by each party according to the Arbitration Act, No. 93 or any statutory enactment in that behalf for the time being in force.

On 10 May 1984 the 1st defendant requested the plaintiffs to appoint their arbitrator. By a letter dated 11 October 1984 the 1st defendant notified the plaintiffs that they had appointed the 2nd defendant as an arbitrator and requested the plaintiffs to nominate theirs. Then, by their letter dated 9 March 1985 the 1st defendant further notified the plaintiffs that they had appointed the 2nd defendant the sole arbitrator under s. 9(b) of the Arbitration Act 1952. By their letter dated 20 March 1985, the plaintiffs pointed out to the 1st defendants' solicitors that there was no arbitration agreement between them and the 1st defendants, and hence there was no basis upon which an arbitrator was to be appointed by either the 1st defendant or the plaintiffs.

It is not disputed that the appointment of the 2nd defendant as the sole arbitrator by the 1st defendant made *vide* their letter dated 9 March 1985 was made under the powers provided in s. 9(b) of the Arbitration Act 1952. The section reads:

> 9. Where an arbitration agreement provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless a contrary intention is expressed therein:
>
> (a) ...
>
> (b) if on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for twenty-one/21 clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

Provided that the High Court may set aside any appointment made in pursuance of this section.

Mr. Rajah submitted that in view of the existing leases between the 1st defendant and Kumpulan Fima Bhd. and the two sub-leases created by Kumpulan Fima Bhd. to the plaintiffs, there is no privity of contract between the plaintiffs and the 1st defendant. The result of a privity of contract is that the covenants in the leases are mutually enforceable. However, in this case, Counsel submitted that as there is no privity of contract between the parties the 1st defendant has no right to call the plaintiffs to go to arbitration under the arbitration clauses in the annextures to the sub-leases.

Looking at the instruments of the lease and the sub-leases, it is clear to me that both sets were prepared in Forms 15A and 15B of the National Land Code. In the event, a lease of the said property was created by the 1st defendant in favour of Kumpulan Fima Bhd. and a sub-lease by the latter to the plaintiff which were duly registered. However, as for the sub-leases, Judith Sihombing in her book *"National Land Code"* under *"Leases under the Code"* at p. 411 seems to apply the English doctrine of privity of contract when she stated that:

> As between the lessor and the lessee there is privity of contract and privity of estate; as between the lessor and the sub-lessee there is neither privity of estate nor privity of contract; as between the lessee and the sub-lessee there is privity of contract and privity of estate...
>
> The result of privity of contract is that the covenants in the lease are mutually enforceable.

It is clear that the English doctrine of privity of contract applies to our law of contract. (See: *Kepong Prospecting Ltd. v. Schmidt* [1968] 1 MLJ 170). Therefore on the face of the instrument as well as in form, the documents are in fact sub-leases. As it has been established that there is no privity of contract between the 1st defendant and the plaintiffs, the 1st defendant cannot enforce the covenant of the sub-lease relating to the appointment of arbitrators.

However, it is the contention of the 1st defendant that in reality the sub-leases are assignments. Mr. Lim Peng Siew, for the 1st defendant, has persuaded me to consider the substance of the sub-leases created by Kumpulan Fima Bhd. to the plaintiffs. He submitted that the Court can go behind the form and look at the intention of the parties, the reality of the situation and the essence of transaction to discover whether it was a sub-lease or an assignment. Counsel relied on a passage quoted by Hashim Yeop Sani J in *Yong Nyee Fan & Sons Sdn. Bhd. b. Kim Guan & Co. Sdn. Bhd.* [1979] 1 MLJ 182 at 190 which states:

> Equity adopts what is called the "Metaphysical" approach and has preference for substance over form and equity pays greater attention to the intention of the parties and the method used in arriving at an arrangement - see *Keeton and Sheridan's Equity.* This general principle was expressed by Romilly MR in *Parkin v. Thorold* [1862] 16 Beav. 59, 66-67; ER 698:
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> > Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it finds that insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form and thereby defeat the substance.

Counsel relied on the affidavits of Mr. Khoo Khay Huat, the 1st defendant's Commercial Manager, affirmed on 21 October 1985 and 28 August 1986 respectively (enclosure 22 and 28). Mr. Khoo maintained all along that the Sub-Leases created by Kumpulan Fima Bhd. in favour of the plaintiffs were in fact assignments. From his affidavits, the contents of which were never refuted or challenged by the plaintiffs, I come to the following finding of fact:

(1) That on 3 July 1979, Kumpulan Fima Bhd. informed the 1st defendant that on the direction of the Cabinet they would undertake the construction of bulking facilities in the Port of Butterworth. Pursuant to this direction they applied to the 1st defendant for lease of the said land.

(2) At the meeting of 10 December 1979 Kumpulan Fima Bhd. informed the 1st defendant that they were incorporating a subsidiary company to undertake the business of contracting and providing bulking facilities in Penang. On 7 June 1980 Kumpulan Fima Bhd. informed the 1st defendant of the incorporation of the plaintiffs as their subsidiary company. Hence, the plaintiff was incorporated and commenced business on 19 August 1980.

(3) On 15 March 1982 Kumpulan Fima Bhd. wrote to the 1st defendant asking for renewal of the Lease and consent of the 1st defendant to sub-lease the said property to the plaintiffs to enable the latter to obtain loans from commercial banks in order to finance the said project. This was followed by a further meeting held on 27 April 1982. Consequently, on 21 May 1982 the 1st defendant agreed to transfer the lease from Kumpulan Fima Bhd. to prepare a draft deed of assignment for their approval.

(4) On 15 June 1982 Kumpulan Fima Bhd. informed the 1st defendant that in their opinion a sub-lease to the plaintiffs would be more appropriate than the assignment because the said land had been earlier leased to Kumpulan Fima Bhd. pursuant to Cabinet directive for Kumpulan Fima Bhd. to undertake the project. The 1st defendant acceded to this request. Hence the two sub-leases were accordingly prepared in Forms 15A and 15B National Land Code and were duly registered as such under s. 222 National Land Code.

(5) It was also disclosed that when notified about the damage, the plaintiffs on 3 May 1983 confirmed that they were responsible for implementing the said project and they requested that all correspondence in respect of the damage be addressed to them in place of Kumpulan Fima Bhd. to enable "our lawyers to take further action without involving Kumpulan Fima Bhd.".

Based on these undisputed facts and the surrounding circumstances, I can safely conclude that in substance the preliminary discussions between the 1st defendant and Kumpulan Fima Bhd. culminating in the execution of the sub-leases was for the preparation of assignment. Being a subsidiary company of Kumpulan Fima Bhd. the plaintiff company was incorporated with the main object of undertaking the said project. I think what strikes me most from these facts is that the plaintiffs required the documents to be prepared as sub-leases instead of assignments to enable them to charge the said property to a consortium of commercial banks through Bumiputra Merchant Bank Bhd. for a loan of RM18,000,000 (Exhibit K9 of encl. 2). Undoubtedly, this must be their prime consideration for insisting that the 1st defendant executes the sub-leases instead of the deed of assignments.

There are clear authorities which say that the intention of the parties is an important consideration in determining the contractual relationships but in every case the intention must be sought from the substance, the conduct of the parties and the surrounding circumstances. (See: *Goh Gin Chye & Anor. v. Peck Teck Kian Realty Pte. Ltd. & Anor*. [1987] 2 MLJ 118).

Based on my above conclusions, and following the principle expressed by Romilly MR in *Parkin v. Thosold* (*supra*), I am satisfied that the said sub-leases are actually assignments given by Kumpulan Fima Bhd. to the plaintiffs. Cheshire and Burn's *Modern Law of Real Property*, 13th Edn. says at p. 439 that on making what purports to be an assignment there must be transferred to the assignee the whole interest under the lease and the other point is that the sublessee must take the identical interest which the lessee possessed.

"But there is no magic in words. If a man had acquired an interest in the tenancy and a question arises with regard to his position, the first point that falls to be considered is whether he has taken the whole of the tenant's interest. Thus where the tenant executes a deed couched in the form of an under-lease, which purports to sub-let the property for the whole of the remainder of his term, or for a longer period, the transaction amounts to an assignment".(*ibid*)

In this case, the instrument was registered as sub-lease and was for a term terminating on the day before the lease would expire. However, the term is renewable in both the Lease and the sub-lease and both are capable of being renewed to end on the same day. Since the sub-lease is capable of being renewed to last precisely the same length of time as the lease may be renewed, the sub-lease should be construed as an assignment, being a demise of the whole term. - *Milmo v. Carreras* [1946] 1 KB 306. Further, an identical interest is also transferred i.e., the rights and obligations under the lease to build, construct and maintain the bulking installations.

For the above reasons, the plaintiffs' application is dismissed with costs.

As for the position of the 2nd defendant in this application, I find there is no justification for bringing him in as a party. In the circumstances, I order the plaintiffs to pay their costs in connection with this application.

Also found at [1988] 1 CLJ 346